

5. Whether and to what extent Claimant is entitled to the following benefits:
 - (a) temporary disability;
 - (b) permanent partial impairment (PPI);
 - (c) permanent disability in excess of impairment (PPD); and
 - (d) medical care;
6. Whether apportionment for a preexisting condition is appropriate; and
7. Whether Claimant's condition is compensable under Idaho Code § 72-451.

In briefing, Claimant raised a new issue. She asked for an award of attorney fees under Idaho Code § 72-804. This issue was not identified in the notice of hearing and shall not be added.

Further, in her reply brief, Claimant raised new issues about a declaratory ruling previously issued by the Commission as well as certain Constitutional issues. These issues were not identified in the notice of hearing and shall not be added.

CONTENTIONS OF THE PARTIES

The parties agree that due to a clerical error Claimant was paid for eight months a base salary of \$3050 per month instead of her actual base salary of \$1550 per month. She did not report these erroneous overpayments. Upon discovering them, Employer questioned Claimant about why she had not reported them. The questioning was conducted in two interviews on July 20, 1999 (hereinafter "the interviews"). The first was conducted by Detective Arville "Butch" Glenn. The second was conducted by Sergeant Scott Johnson.

Claimant contends she suffered Post-Traumatic Stress Disorder ("PTSD") as a result of the interviews. This case should be considered a "mental-physical" claim compensable under Idaho Code § 72-451. Claimant gave timely oral notice but Employer refused to file a workers' compensation injury report.

Defendants contend Claimant did not suffer an accident causing injury as required by Idaho Workers' Compensation Law. She did not report one timely. This case should be

considered a “mental-mental” claim for which compensation is precluded by Idaho Code 72-451. Moreover, the claim is barred by application of Idaho Code § 72-451(2).

EVIDENCE CONSIDERED

The record in this case consists of the following:

1. Oral testimony at hearing by Claimant and her husband;
2. Claimant’s Exhibits 1, 3-13, 15-29, 31-85, and 87;

EXCEPT for portions of Exhibits 3, 4, 8, 20, 21, and 63 as follows: The affidavit of Claimant’s counsel, part of Exhibit 3, is not admitted; and correspondence authored by Claimant’s counsel, parts of Exhibits 4, 8, and 63, are not admitted; and the 42-page “addendum” authored by Claimant’s counsel, part of Exhibit 63, is not admitted; and all references to other employees in Exhibits 20 and 21 are not admitted.

Defendants filed a motion in limine. They objected to Claimant’s proposed exhibits which related to a computer-generated report of an EEG performed by psychiatrist F. Lamarr Heyrend, M.D. At hearing, the Referee reserved a ruling on the admissibility of the proposed exhibits until they could be more completely examined *in camera*. The Referee, having examined the proposed exhibits, rules as follows:

Claimant’s Exhibit 48 is a computer-generated report of an EEG. It differs from a standard EEG report. It presents a “snapshot” of the electrical activity of Claimant’s brain occurring in an instant during the EEG test. Such a report is variously called “quantitative EEG,” “Q-EEG,” “evoked potential EEG,” or “brain mapping.” (Hereinafter all are referred to as “brain mapping.”) Its use is controversial within both the medical and forensic worlds. It does not meet either the Frye or Daubert standards for admissibility of evidence. Nevertheless, the Industrial Commission is not bound by the Idaho Rules of Evidence. The Industrial Commission is authorized to exercise discretion in admitting evidence, subject to its own Judicial Rules of Practice and Procedure (“JRP”). The same or a substantially similar document was

proffered by Defendants and admitted as part of Defendants' Exhibits 18 and 24 without objection or limitation.

Claimant's Exhibits 42-44 represent summary medical reports by Dr. Heyrend which discuss his analysis of the "brain mapping." These are medical records of Dr. Heyrend's observations and opinions relating to his treatment of Claimant.

Defendants' objection and motion in limine regarding these documents are OVERRULED and DENIED. Claimant's Exhibits 42, 43, 44, and 48 are admitted to the record.

3. Defendants' Exhibits 1-45 were admitted at hearing.

Defendants' Exhibits 46 and 47 were conditionally proffered, to be admitted only upon the admission of Claimant's "brain mapping" exhibits. Defendants' Exhibits 46 and 47 are admitted to the record.

4. The following posthearing depositions:

a) Joseph A. Lipetzky, Psy.D.;

All objections and the motion to strike are OVERRULED and DENIED.

b) F. Lamarr Heyrend, M.D., dated November 17, 2005;

All objections are OVERRULED, EXCEPT that the objection to Deposition Exhibit 2 is SUSTAINED.

JRP 10 requires that the parties disclose proposed evidence timely before the hearing. It states that evidence may not be "developed, manufactured, or discovered" after the hearing, except upon good cause shown. The material contained in Exhibit 2 to the November 17, 2005, deposition of F. Lamarr Heyrend, M.D., was previously requested by Defendants in discovery and should have been disclosed in accordance with JRP 10 prior to hearing. Therefore, Exhibit 2 to this deposition is ordered stricken from the record.

- c) F. Lamarr Heyrend, M.D., dated January 19, 2006;
- d) Richard W. Wilson, M.D., dated January 25, 2006;

The objection at page 84, line 22 is SUSTAINED. All other objections are OVERRULED.

- e) Richard W. Wilson, M.D., dated March 28, 2006;

The objections at pages 24, 25 line 5, pages 31, and 44 are SUSTAINED. All other objections are OVERRULED.

- f) Cynthia Brownsmith, Ph.D.;

All objections are OVERRULED, including Claimant's post-deposition objection and motion to strike the entire deposition. Deposition Exhibits 1 and 2 were not objected to and are admitted as part of the record. Deposition Exhibits 3 and 4 are referred to in the deposition but are not attached to the deposition and were not submitted at hearing. Unless otherwise admitted elsewhere they are not part of the record. Deposition Exhibit 5 is the same correspondence with addendum authored by Claimant's counsel which was ruled inadmissible at hearing as part of Claimant's Exhibit 63 and is not part of the record.

The Referee takes judicial notice of the decisions of the Idaho Supreme Court arising from the same events: Gibson v. Ada County, 142 Idaho 746, 133 P.3d 1211 (2006); Gibson v. Ada County, 318 Idaho 787, 69 P.3d 1048 (2003); and Gibson v. Ada County Sheriff's Dept., 139 Idaho 5, 72 P.3d 845 (2003).

Numerous affidavits, objections, motions, responses, replies, and surreplies were filed posthearing as the parties attempted to include or exclude certain posthearing expert testimony and evidence that arose. Commission rules do not provide for the submission of reply or surreply arguments on motions. All replies and surreplies to motions and objections are ordered stricken from the record.

Claimant appended four exhibits to her reply brief. These exhibits were not submitted in accordance with any law or rule pertaining to this Commission and are ordered STRICKEN from the record.

At page 49, lines 14-17 of the hearing transcript, the Referee misspoke about the admission of certain exhibits, the admissibility of which had previously been ordered or reserved on the record. The Referee subsequently clarified this error in writing to the parties. Therefore, page 49, lines 14-17 of the transcript should be stricken and given no consideration.

After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

(Credibility of witnesses became a major issue in this matter. Thus, findings of fact about certain aspects of testimony or allegations are relevant.)

The Event

1. Claimant worked for Employer as a records technician beginning July 10, 1997. On October 15, 1998, she was promoted to the position of jail technician. The promotion involved a change of her job site and a \$50 per month raise in base salary, from \$1500 to \$1550 monthly.

2. Because of a clerical error, Claimant was erroneously overpaid. The error caused her old and new base salaries to be added together instead of substituting the new for the old. Her actual pay was issued assuming a \$3050 base salary every month for eight months. (A pro rata adjustment for the partial month in which her \$50 raise began resulted in a slightly different amount of erroneous overpayment in October 1998.)

3. Claimant did not notify Employer of the erroneous overpayments.

4. When Employer discovered the erroneous overpayments, it began an investigation.

5. On July 20, 1999, Claimant was interviewed by Detective Arville “Butch” Glenn who also worked for Employer.

6. The interview with Det. Glenn was tape recorded. The majority of that interview was transcribed. However, the transcript is not complete. It ends about 7.9 minutes into side two of the recording. Det. Glenn left the room, but about 9½ minutes later, he returned and resumed the interview for nearly 20 more minutes. The record contains no transcript of those 20 minutes, but the tape recording can be heard and understood.

7. On July 20, 1999, after the completion of the interview by Det. Glenn, Claimant was interviewed by Sgt. Scott Johnson who also worked for Employer. The interview with Sgt. Johnson was tape recorded and the recording transcribed. The tape recording in evidence does not contain the final few minutes of the interview as transcribed at page 43 of Claimant’s Exhibit 19. (Claimant’s Exhibit 19 is a better copy than Defendants’ Exhibit 10 because Defendants’ Exhibit 10 contains an incorrect page 29.)

8. Claimant admitted she was not struck nor touched during the interviews. She did not fall. She was not physically injured nor physically threatened. Nevertheless, she characterized the interviews as “brutal.”

9. By July 28, 1999, Claimant had retained counsel. Thereafter, Employer’s contacts with Claimant were made through her attorney.

10. PTSD is a psychological disorder defined and diagnosed in accordance with the Diagnostic and Statistical Manual of Mental Disorders, fourth edition, text revision, (“DSM-IV-TR”) published by the American Psychiatric Association. Claimant alleged she suffered PTSD as a result of the stress of these interviews. She alleged her PTSD was

compounded by the subsequent actions of Employer in completing its investigation and in terminating her employment, and by the actions of Defendants in the course of discovery during this matter. She characterized these subsequent actions a “revictimization.”

11. At the time of the interviews, Claimant was pursuing confirmation of her Chapter 13 bankruptcy plan which she and her husband filed on May 20, 1999.

12. Also at the time of the interviews, Claimant was taking a short medical leave. She underwent a biopsy on July 14 or 16, 1999 and next visited her treater, Stephen E. Spencer, M.D., on July 23, 1999 when she learned the biopsied mass was benign. On July 23, she reported insomnia, diarrhea, lack of appetite, and abnormal thoughts. She attributed these symptoms to the interviews. Dr. Spencer diagnosed “acute depression secondary to situational distress.” He prescribed Zoloft in the same dosage which he had prescribed for her prior depressive episodes. Dr. Spencer’s records show he relied upon Claimant’s descriptions about her work problems and her symptoms. He relied upon her descriptions when he acquiesced to her request for a medical excuse and reported she was unable to participate in Employer’s follow-up investigation. The history of pay disputes which Claimant provided to Dr. Spencer was inconsistent with the facts as described by other evidence of record.

13. After the date of the interviews, except for Claimant’s weight, pulse, and blood pressure, Dr. Spencer did not record that he observed any objectively measurable physical symptoms. For example, in an October 24, 2001 examination by Dr. Spencer, Claimant complained that she was losing her hair from stress. Dr. Spencer noted that her scalp appeared normal and that “she is not experiencing any depression at all.” He did not provide any objective means of assessing the accuracy of his observations. This was her last visit of record to Dr. Spencer.

14. On December 16 and 17, 1999, Sgt. Johnson conducted surveillance on Claimant. She was unaware of this surveillance until she read about it in a report which was disclosed during the course of her multifaceted litigation against Employer.

15. Claimant's employment with Employer was terminated effective December 27, 1999.

16. Claimant prepared a first report of injury on July 5, 2001. She filed a Workers' Compensation Complaint with the Industrial Commission on July 16, 2001.

History of Pay Discrepancies

17. Employer issued a monthly pay voucher to Claimant. The vouchers included a description of salary amount, overtime hours worked, tax and other withholdings, and net pay to be received by Claimant. It contained a verification line for Claimant's signature. Beginning with her first pay voucher in 1997, Claimant believed she worked overtime which was underreported and consequently underpaid. She called it to Employer's attention "the first several times." She never filed a formal grievance before her employment was terminated.

18. Claimant alleged she regularly worked significant overtime. She alleged she recorded and can document the exact amount she was underpaid for overtime while working for Employer.

19. After Claimant's promotion and \$50 raise was announced, but before she actually began the jail technician job, Claimant complained about the processing time required. She complained to a coworker that the delay was costing her \$50 per month.

20. Claimant alleged that before she received her promotion she "just got to the point I couldn't keep track of comp time, flex time, overtime. I just signed the pay vouchers without even thinking about it."

21. Claimant alleged that after the erroneous overpayments began she never looked at any voucher she signed.

22. Claimant alleged she never looked at any direct deposit slip Employer may have provided.

23. Claimant alleged she had a checking account separate from her husband's checking account (although he was an authorized signatory on her account). She inconsistently alleged at different times the frequency with which her husband made deposits to or withdrawals from her checking account. Claimant alleged at different times that her husband handled all the finances and that he never balanced a checkbook during the period of erroneous overpayments. Claimant admitted she gave Det. Glenn inaccurate information about her husband's involvement with her checking account.

24. Claimant alleged she never looked at any bank statement she received after the erroneous overpayments began. She alleged she often did not even open the envelopes her bank statements came in.

25. Claimant alleged she never balanced her checkbook nor had any idea of what her checking account balance should be during the eight months she received the erroneous overpayments.

26. Claimant alleged she occasionally telephoned her bank to ask for her account balance or to ask whether a check she intended to write would clear. She could not recall ever being surprised that the amount in the account was more than it should have been.

27. Claimant alleged she never looked at the W-2s Employer provided at the end of 1998.

28. Claimant copied a pay voucher to verify her income for her bankruptcy attorney. She alleged she never looked at that voucher while copying it or presenting it to her

bankruptcy attorney. The bankruptcy documents reported her salary at its proper amount - \$1550 per month - and not at the \$3050 represented on the pay voucher. They reported her “estimated monthly overtime” as “0.”

Dr. Heyrend

29. On October 16, 2002, Claimant first visited Dr. Heyrend. Dr. Heyrend acted as both her treating psychiatrist and as an IME examiner/expert witness on Claimant’s behalf through the date of hearing. He opined Claimant suffers from PTSD. He opined the PTSD was caused by a series of events over time beginning with the interviews and includes the “3 months” she thought she might be charged with a crime, as well as the “revictimization” associated with this litigation. He opined Claimant is not stable and will continue to improve.

30. Dr. Heyrend acknowledged his diagnosis requires him to interpret the precipitating stressor differently than as required by DSM-IV-TR. He acknowledged the diagnosis requires that an event be objectively life-threatening and that Claimant’s event – the interviews – was not objectively life-threatening. However, he asserted that because Claimant is very sensitive this prerequisite criterion – that the event be objectively life-threatening – need not be taken literally. He agreed with Claimant’s attorney that her “identity” was threatened with “annihilation” and she felt threatened with “psychological extinction,” i.e., with loss of her career and being labeled a criminal. He opined that she “magnified enormously” the perceived event and that her perception of it was compounded by the potential severity of potential charges, by her claimed expectation that this job would be a permanent career, and by the alleged fact that “this woman did not believe she had done anything wrong.”

31. Dr. Heyrend admitted he took Claimant at her word and did not review either the tape recordings nor transcripts of the interviews. He admitted his diagnosis derived from Claimant’s self-reported “listings of behavior.” He vacillated about whether the “brain

mapping” was diagnostic. He testified, “I am the only one that has patents from the U.S. Patent’s Office Utilization of EEG Technology to Determine Human Behaviors. That is precisely what it is for, to determine human behaviors. It cannot determine diagnosis.” He acknowledged controversy exists within the medical community about whether “brain mapping” is useful in a forensic context. He admitted, “I am the only one that has done this particular study.”

32. Dr. Heyrend opined Claimant’s PTSD should be considered “physical” because it involves a change of tissue – specifically, “shrinkage of limbic projections of the frontal lobes in the hippocampus” as well as changes to other structures deep in the brain. He admitted he took no direct measurements to confirm these structural brain changes occurred or to confirm Claimant’s allegations of physical manifestations resulting from stress. He performed no genetic testing.

33. No other physician concurs with Dr. Heyrend’s diagnosis of PTSD. All physicians agree the interviews do not constitute an “extreme traumatic stressor” of the type required to allow a diagnosis of PTSD to be made as defined by DSM-IV-TR.

34. Dr. Heyrend also opined Claimant suffered a fugue state as a result of seeing a police vehicle while she was driving. This opinion is based entirely upon Claimant’s description of that occurrence. No other physician concurs with this opinion.

Other Physicians

35. Cynthia Brownsmith, Ph.D., evaluated Claimant at Defendants’ request. The evaluation occurred in three parts, on June 20, 24, and July 11, 2003. Dr. Brownsmith opined Claimant did not sustain any psychological injury as a result of the July 20, 1999 interviews. She opined the interviews were not the predominate cause of any symptoms Claimant was reporting. She opined Claimant did not suffer from PTSD.

36. Claimant retained Joseph A. Lipetzky, Psy.D., to evaluate her and to testify. He evaluated Claimant on April 29, 2004. He opined Claimant did not suffer from PTSD. He disagreed with Dr. Heyrend about whether Claimant suffered a “fugue” state while driving. He opined Claimant did suffer from “panic disorder with agoraphobia” from June 20, 1999 through February 2000 and possibly through August 2000; Claimant did suffer from “panic disorder without agoraphobia” into the fall of 2003; Claimant suffers from continuing symptoms of depression and anxiety. He related the anxiety to her various litigation efforts.

37. Neurologist Richard W. Wilson, M.D., evaluated Claimant at the request of Defendants. He ordered an EEG which was performed August 24, 2005. He opined Claimant did not suffer from any neurological disease. She exhibited some symptoms of depression, some symptoms suggestive of somatoform disorder and perhaps some symptoms suggestive of panic attacks. He opined Claimant suffered no psychological illness as a result of the July 20, 1999 interviews. He opined Claimant does not suffer from PTSD.

Prior Medical Records

38. On October 4, 1993, Wendell Wells, M.D., treated Claimant for depression arising from domestic stress. Claimant expressed concern over suicidal thoughts and other depressive symptoms.

39. Dr. Spencer treated Claimant for seasonal depression in 1996 and for situational depression occasionally, thereafter, associated with domestic stress. She underwent counseling, apparently only two visits.

Other Employment and Non-Medical Factors

40. Claimant was 40 years of age at the time of the interviews that give rise to this claim.

41. Claimant earned a high school diploma. She attended courses at Idaho State University and at the College of Southern Idaho. She completed various correspondence courses while working for Employer.

42. Claimant has worked as a retail clerk, a bookkeeper and receptionist. She has worked as an auto parts inventory controller and part-time bookkeeper. She was an owner of a grocery store where she performed all functions, including bookkeeping. She has worked as a quality assurance technician, a payroll clerk and a part-time bookkeeper for a prior employer. She worked as an office coordinator and as an inventory and payroll clerk handling billing and payments for another prior employer.

43. Since termination, Claimant trained for about one year as a private investigator, obtaining her license in May 2000. She also worked as an on-call night auditor for a motel beginning August 2000, as a bookkeeper for a bankruptcy trustee beginning July 2001, and as a freight handler for a craft store beginning November 2002.

44. Claimant's appearance and articulateness present no obstacle to obtaining employment consistent with her education and training. No non-medical factors, other than the facts surrounding her termination from Employer, reduce her competitiveness for employment.

Discussion and Further Findings

45. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. Aldrich v. Lamb-Weston, Inc., 122 Idaho 316, 834 P.2d 878 (1992).

46. **Credibility.** Claimant lied under oath. She testified she regularly worked substantial overtime for Employer. She testified by written statement to the bankruptcy court that her “estimated monthly overtime” was “0.” This bankruptcy statement, Schedule I, was signed by Claimant under penalty of perjury on May 20, 1999 and duly filed. Claimant’s testimony is impeached.

47. Claimant’s testimony and representations to Employer and to physicians was often inconsistent at different times: She alternately knew or didn’t know whether her salary was \$1550 per month; she gave irreconcilably inconsistent descriptions of her husband’s activity in her checking account; she testified to sores and rashes arising from stress but did not report these to Dr. Spencer.

48. Claimant’s testimony was often inconsistent with other evidence of record. For example, she testified she “didn’t know what he [Det. Glenn] was talking about” when he began the interview. To the contrary, the tape recording reveals that Claimant exhibited no confusion at first and promptly stated her initial defense, which was that she had no idea she was being erroneously overpaid. She presented this defense before Det. Glenn even suggested that erroneous overpayments had been made or confronted her with documentary evidence of the fact. Her testimony and other representations about the alleged threats made by Det. Glenn and Sgt. Johnson are not borne out by the recordings or transcripts of the interviews. Her characterization of the interviews bears only a remote correspondence to the recordings and transcripts.

49. Claimant’s testimony often was inherently improbable. Claimant’s history as a bookkeeper is inconsistent with her alleged willful blindness to her finances during the period of erroneous overpayments. Her allegedly meticulous recordkeeping of overtime underpayments is inconsistent with her alleged ignorance of her pay during the period of

erroneous overpayments. Claimant's frequent complaints about being underpaid for overtime before the erroneous overpayments occurred are inconsistent with her claims of personal financial ignorance. Claimant's statement about the delay in processing her \$50 raise is inconsistent with Claimant's alleged ignorance as to when or whether she first actually received it. Claimant's attention to finances in order to file her bankruptcy plan is inconsistent with her alleged willful blindness to the erroneous overpayments.

50. These findings of fact do not describe in detail all of the examples of instances in which Claimant's testimony contradicts itself, is directly at odds with evidence of record, or is inherently improbable. The record is replete with such instances.

51. Claimant's demeanor at hearing exhibited untruthfulness. When testifying about these allegedly traumatic interviews and their aftermath which allegedly caused PTSD and left her only 50% functional, she exhibited a normal range of affect and good emotional control. Moreover, Claimant repeatedly described memory problems when confronted with discrepancies in her testimony. Indeed, she often testified that she could barely remember the interviews. She testified she sometimes cannot remember an important conversation as little as 15 minutes later. Finally, the great and detailed extent to which Claimant's attorney led Claimant's examination on the witness stand at hearing showed Claimant was relatively unfamiliar with the alleged facts to which she was expected to testify. In sum, Claimant's testimony demonstrated she tolerates only a casual acquaintance with the truth.

52. Because Claimant's testimony is unreliable, opinions by her treating physicians, to the extent they rely upon statements and representations made by Claimant, are similarly unreliable.

53. Observations of Claimant by her husband are unreliable because Claimant had opportunity, by word and action, to manipulate her husband's observations.

54. **Notice.** Claimant is required to notify Employer of her workers' compensation claim within 60 days of the occurrence. Idaho Code § 72-701. The interviews occurred on July 20, 1999. Claimant actually prepared a first report of injury on July 5, 2001. The first hint in the record of any indication of a potential workers' compensation claim is dated May 14, 2001. Claimant attempts to skirt this blatant failure in two ways: First, she alleged she orally notified Employer who refused to prepare a notice of injury; and second, she alleged she was "revictimized" by actions of Employer both before and after the filing of the Complaint in this matter. Neither attempt succeeds.

55. First, as set forth in the credibility section above, Claimant's testimony, without *bona fide* evidentiary support, is worthless. Nothing in the record supports Claimant's testimony that she notified Employer around the time of Employer's follow-up investigation or during her visit to Charles D. Stewart, M.D. in the summer of 1999. The mere fact that Employer was aware Claimant was seeking medical attention does not constitute notice to Employer that a potential claim existed. Claimant was on medical leave for an unrelated biopsy both before and after the interviews. She had a history of emotional or psychological distress. Employer did not have the knowledge required to apply Idaho Code § 72-604. No action or inaction by Employer tolled the running of the statute, Idaho Code § 72-701, which requires Claimant to give notice within 60 days.

56. Second, the thought that continuing "revictimization" somehow tolls the running of the statute or is a part of a continuing "accident" is irrelevant unless and until Claimant meets her burden of proof to show she suffered an otherwise compensable injury. As set forth below, she failed to so show.

57. Finally, as early as July 28, 1999, Claimant retained the attorney who brought the workers' compensation claim. Surely, long before the first notice of injury was prepared

on July 5, 2001, she had access to competent advice and ample opportunity to document any attempt at making a workers' compensation claim. She had similar opportunity to document that Employer was refusing to acknowledge one. The absence of such documentation undercuts her allegation that she orally gave notice.

58. **Accident.** Claimant bears the initial burden of demonstrating a prima facie case. *See, Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996). “‘Accident’ means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.” Idaho Code § 72-102(18)(b).

59. Here, Employer called Claimant in to interview her about pay discrepancies. This event was not unexpected, undesigned, nor unlooked for by Employer. Moreover, it is inherently improbable that the event was unexpected by Claimant; she was prepared to assert her defense before Det. Glenn described the problem. Even if she could not expect the exact time when the erroneous overpayments would be discovered, she could expect with near certainty that it would eventually happen. Where the event was intended by an employer, and a claimant voluntarily participated, the event itself cannot be categorized as “unexpected, undesigned, and unlooked for.” *See, Roe v. Albertson’s Inc.*, 141 Idaho 524, 112 P.3d 812 (2005)(sexual activity with minor employee was not an accident). Claimant failed to show that the interviews themselves constitute an accident as defined by Idaho Code § 72-102. Further, she failed to show that an accident occurred during the course of the interviews.

60. **Injury.** “‘Injury’ and ‘personal injury’ shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body.” Idaho Code § 72-102(18)(c). Here, Claimant admitted she did not suffer a physical injury as a result of the interviews. Rather, she claims first that PTSD caused or was caused by physical

changes to structures within her brain and second that psychological trauma resulted in physical manifestations which can be considered injuries.

61. First, Claimant bears the burden of proving it likely she suffers from PTSD. To meet the diagnostic criteria for PTSD an “extreme traumatic stressor” is required. DSM-IV-TR identifies examples of the magnitude of trauma required to cause a person to suffer PTSD. The example described by DSM-IV-TR which is most nearly analogous to the July 20, 1999 interviews is “incarceration as a prisoner of war or in a concentration camp.” An unbridgeable gulf separates Claimant’s interviews and this example. Claimant was never actually incarcerated. Claimant was never even arrested nor involuntarily detained. Claimant never considered herself “in custody” during the interviews. Indeed, at the conclusion of an interview she asked whether she would be paid wages for her time while participating in the interview. At most, the interviews contained a potential threat of continuing a process, the result of which might include incarceration – as opposed to immediate, actual incarceration. The remotely potential incarceration would not pose many of the physical threats associated with POW camps or concentration camp prisoners. The interviews themselves were an assurance that she would be afforded the dignity of due process as opposed to the capricious brutality associated with wartime incarceration. Finally, there exists a fundamental difference in the status of the relationship when Claimant’s potential jailers vis-à-vis Claimant is compared to the relationship between wartime captors vis-à-vis their captives. Despite the articulate attempts of Claimant’s counsel to semantically characterize a similarity between the interviews and any of the criteria or examples cited by DSM-IV-TR, no actual similarity exists.

62. No physician except Dr. Heyrend opined Claimant suffers from PTSD. Dr. Heyrend admitted the diagnostic criteria could not be taken literally if the diagnosis were to be made for Claimant. Claimant does not suffer from PTSD.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 19

63. Assuming *arguendo*, that she does suffer from PTSD, Claimant failed to show that PTSD caused or was caused by physical changes to structures in her brain. Indirect evidence of a physical component to an alleged mental condition or trauma is insufficient. Clark v. Idaho Truss, 142 Idaho 404, 128 P.3d 941 (2006)(Commission properly rejected neuropsychologist’s opinion that a claimant suffered organic brain injury based upon functional testing and other indirect evidence).

64. Here, Dr. Heyrend opined Claimant suffered PTSD which theoretically involves physical changes to certain brain structures. He suggested Claimant might be genetically predisposed toward PTSD but performed no genetic testing. His only electrodiagnostic test was the EEG. He failed or refused to provide a conventional EEG report and instead provided the controversial “brain mapping” report.

65. “Brain mapping” is a report of a computerized snapshot of an instant occurring during a conventional EEG. Its use is controversial within the medical community. It is generally not accepted in the forensic context. In this case, the “brain mapping” data was admitted only because it was included in Defendants’ proposed exhibits without objection, limitation or reservation. The “brain mapping” report carries less weight than a conventional EEG report. Dr. Heyrend never produced a conventional EEG report of the EEG he performed. A conventional report of it should have been available. Thus, no useful comparison can be made between the EEGs ordered by Dr. Heyrend and Dr. Wilson. The “brain mapping” evidence fails to show credible, direct evidence of mental or physical trauma. It is incapable of showing physical abnormalities – distinct from functional abnormalities – in the brain. Without comparative EEGs over time, it is impossible to determine whether these alleged functional abnormalities constitute functional changes, or when these changes occurred. Without such a factual basis, it is impossible to reasonably speculate why these changes may have occurred.

Moreover, without additional evidence, it is impossible to determine whether these functional changes are the result of physical changes in the brain.

66. Dr. Wilson credibly explained that an EEG can only show functional abnormalities on the surface of the brain. These functional abnormalities may or may not represent abnormalities in the physical structures of the surface of the brain. It is the deep structures of the brain, the hippocampus and locus ceruleus, which Dr. Heyrend contends have been physically changed. An EEG, with or without “brain mapping,” cannot reveal any abnormality in the deep structures of the brain. Thus, the Commission’s reasoning in Clark, quoted with approval by the Idaho Supreme Court, applies here:

[Dr. Heyrend’s] tests – at most – indirectly suggest Claimant may have suffered some injury to [her] brain tissue. No X-ray, MRI, PET scan, or similar diagnostic study directly shows damage to Claimant’s brain tissue. There is no cyst or tumor. There is no indication that Claimant suffers from a chromosomal abnormality as one would find, for example, in an individual with Down’s syndrome. There is no direct evidence of an imbalance of chemicals in Claimant’s brain. Absent direct evidence of an injury to Claimant’s brain tissue, any suggestion of causation or of a *physical* component to Claimant’s [PTSD] is too speculative to be given weight. (Emphasis in original.)

Id., at 408. Thus, Claimant failed to show any brain injury.

67. Second, Claimant also asserted other physical manifestations: rashes, sores, hair loss, etc., arose from the stress or mental trauma of the interviews. Some symptoms clearly predated the interviews as evidenced by prior medical records. Other symptoms are shown as complaints Claimant made to physicians but which are not supported by the physicians’ objective examinations. At best, Dr. Heyrend indicated he recalled seeing some such manifestations although he did not contemporaneously document his observation of these when he examined Claimant. Rather, his records note that Claimant reported them to him, not that he actually observed them. Contemporaneous medical records are vital in treating patients.

Dr. Heyrend's failure to document actual observations upon examination of Claimant undercuts the weight which could be assigned to his memory.

68. Claimant's allegations of other physical manifestations is further undercut by a gap in the medical record. Claimant last saw Dr. Spencer on October 21, 2001, and first saw Dr. Heyrend on October 16, 2002. This gap is inconsistent with Claimant's allegations of continuing physical symptoms from stress.

69. Finally, both arguments, i.e., "PTSD equals brain injury" and "other physical manifestations of stress," are irreconcilable to the statutory requirement of "violence to the physical structure of the body." The interviews were in no way violent. They involved no direct physical impact.

70. Claimant failed to demonstrate that she suffered mental or physical trauma. She failed to demonstrate she suffered injury as defined by Idaho Code § 72-102(18)(c).

71. **Causation.** A claimant bears the burden of proving that the condition for which compensation is sought relates causally to an industrial accident. Langley v. Industrial Special Indem. Fund, 126 Idaho 781, 890 P.2d 732 (1995). Callantine v. Blue Ribbon Linen Supply, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. Paulson v. Idaho Forest Indus., Inc., 99 Idaho 896, 591 P.2d 143 (1979). No "magic words" are required to show a medical opinion is held to that standard. Jensen v. City of Pocatello, 135 Idaho 406, 18 P.3d 211 (2000). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. Dean v. Dravo Corporation, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

72. Although Claimant does not suffer from PTSD, she may suffer from depression or some other psychological illness. The medical records establish that Claimant's

psychological illness predated the interviews. Claimant was experiencing unrelated medical and financial stressors at the time of the interviews. Drs. Wilson and Brownsmith opined Claimant did not suffer any psychological trauma as a result of the interviews. These opinions carry more weight than the opinion of Dr. Spencer. Dr. Spencer relied upon Claimant's inaccurate representations in arriving at his opinion. The opinions of Drs. Wilson and Brownsmith carry more weight than the opinions of Drs. Heyrend and Lipetzky for the same reasons. Claimant failed to show that her psychological illness was probably caused by the interviews.

73. **Idaho Code § 72-451.** Generally, with some exceptions, “psychological injuries, disorders or conditions shall not be compensated” under Idaho Workers’ Compensation Law. Generally, with some exceptions, an “accident and physical injury” is required by subsection (1). As set forth above, the interviews do not meet the definition of “accident” and Claimant’s condition does not meet the definition of “injury” under Idaho Code § 72-102. Idaho Code § 72-451(1) further states:

[A] psychological mishap or event may constitute an accident where: (i) it results in resultant physical injury so long as the psychological mishap or event meets the other criteria of this section, and (ii) it is readily recognized and identifiable as having occurred in the workplace, and (iii) it must be the product of a sudden and extraordinary event.”

74. As set forth above in the section labeled “Injury,” Claimant did not suffer a “resultant physical injury.” Claimant failed to show her allegations of brain injury and other physical manifestations of stress were genuine. Assuming *arguendo* their existence, she failed to show they were the result of the interviews. Thus, she failed to establish criterion (i).

75. Moreover, the interviews were not a “sudden and extraordinary event” as required by criterion (iii). First, the interviews were not “sudden.” They were prearranged by telephone call and lasted about 2½ hours. *A fortiori*, the period of “revictimization” was

not “sudden.” Second, questioning by a detective is not “extraordinary” after embezzlement may have occurred.

76. Regardless of any other consideration, Idaho Code § 72-451(2) acts as a complete bar to any claim of psychological injury arising from the interviews, through and including termination of Claimant’s employment. Idaho Code § 72-451(2) states:

No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from a personnel related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination.

The interviews were a “personnel related action.” They were the initial steps by which Employer could determine whether disciplinary action would be warranted. As such, Claimant’s claim is expressly and completely barred by operation of Idaho Code § 72-451(2).

77. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant failed to give timely notice of accident and injury as required by Idaho Code § 72-701, and the running of the statute was not tolled by operation of Idaho Code § 72-604;

2. Claimant failed to show she suffered a compensable accident;

3. Claimant failed to show she suffered an injury caused by any event arising from or in the course of employment;

4. Claimant failed to show she suffered a physical manifestation of a psychological injury as required by Idaho Code § 72-451(1);

5. Claimant’s claim is barred by application of Idaho Code § 72-451(2);

6. Each of the foregoing conclusions of law independently precludes compensation under the Idaho Workers’ Compensation Law; and

7. All other issues are moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 2ND day of March, 2007.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16TH day of MARCH, 2007, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Vernon K. Smith
1900 West Main Street
Boise, ID 83702

Jon M. Bauman
P.O. Box 1539
Boise, ID 83701

db

/S/ _____

injury as required by Idaho Code § 72-451(1).

5. Claimant’s claim is barred by application of Idaho Code § 72-451(2).

6. Each of the foregoing conclusions of law independently precludes compensation under the Idaho Workers’ Compensation Law.

7. All other issues are moot.

8. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 16TH day of MARCH , 2007.

INDUSTRIAL COMMISSION

/S/ _____
James F. Kile, Chairman

/S/ _____
R. D. Maynard, Commissioner

/S/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 16TH day of MARCH, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Vernon K. Smith
1900 West Main Street
Boise, ID 83702

Jon M. Bauman
P.O. Box 1539
Boise, ID 83701

db

/S/ _____